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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

HING Q. LUM; DEBRA LUM, HUSBAND AND WIFE; GARY ORIANI, PETITIONERS

v.

BANK OF AMERICA; CITIBANK, N.A.; FIRST UNION NATIONAL BANK; WELLS FARGO BANK, N.A.; FLEET BANK; PNC BANK, N.A.; THE BANK OF NEW YORK; KEY BANK; BANK ONE; U.S. BANK; JOHN DOES 1 THROUGH 100; JP MORGAN CHASE BANK, N.A.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is proof of reliance required to establish a civil claim under RICO based upon predicate acts of mail and/or wire fraud?

2. Should this Court resolve the conflict among the eight circuit courts of appeals which have considered this issue, and reassert the intention of Congress in enacting RICO's civil enforcement machinery by holding that RICO does *not* require proof of reliance when the predicate acts are mail and/or wire fraud?

3. Did respondents fatally undermine the integrity of the truth-determining process, commit a fraud on the court, or cause a "grave miscarriage of justice" when they intentionally misrepresented their understanding of the term "prime rate" to the courts below, in order to sanitize their conduct in charging petitioners a rate of interest on their "prime plus" credit agreements that was based upon fraudulently inflated "prime rate" indices?

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The unpublished opinion of the United States Court of Appeals for the Third Circuit in *Hing Q. Lum et al. v. Bank of America et al.*, C.A. No. 05-5460, decided May 7, 2007, affirming the order of the District Court dismissing the petitioners' complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), is set forth in the Appendix hereto (App. 1-10).

The unpublished decision of the District Court for the District of New Jersey in *Hing Q. Lum et al. v. Bank of America et al.*, Docket No. 05-2640(FSH), filed December 8, 2005, dismissing the petitioners' complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), is set forth in the Appendix hereto (App. 11-17).

The unpublished opinion of the United States Court of Appeals for the Third Circuit in *Hing Q. Lum et al. v. Bank of America et al.*, C.A. No. 05-5460, decided June 7, 2007, denying the petitioners' petition for rehearing, is set forth in the Appendix hereto (App. 18-19).

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit affirming the decision of the District Court affirming the order of the District Court dismissing the petitioners' complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), was entered on May 7, 2007; and its further order denying the petitioners' timely filed petition for panel rehearing was filed and decided on June 7, 2007 (App. 1-10;18-19).

This petition for writ of certiorari is filed within ninety (90) days of June 7, 2007. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

18 U.S.C. § 1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to

be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1961(5):

As used in this chapter [18 USCS §§ 1961 et seq.] –
* * * (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment)

after the commission of a prior act of racketeering activity;

18 U.S.C. § 1961(1)(b):

As used in this chapter [18 USCS §§ 1961 et seq.] --

1) "racketeering activity" means...(B) any act which is indictable under any of the following provisions of title 18, United States Code:...section 1341 [18 USCS § 1341] (relating to mail fraud), section 1343 [18 USCS § 1343] (relating to wire fraud)...

18 U.S.C. § 1962(a):

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS § 2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices

in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

18 U.S.C. § 1962 (c):

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1964 (c):

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 USCS § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962 [18 USCS § 1962]. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

STATEMENT

The "prime rate" is widely understood throughout the banking industry to mean the interest rate which banks charge on short-term, unsecured loans to their most creditworthy commercial customers. *Cf. Till v. SCS Credit Corp.*, 541 U.S. 465, 479 (2004) (defining the "prime rate" as "the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default."). Because it represents the interest rate which banks charge their best customers, the "prime rate" is considered to be an extremely favorable rate by wide segments of the borrowing public, including consumers and small businesses, as well as by economic and legal scholars. It is also considered to be competitively based. Indeed, this Court's decision in *Till* implicitly assumed that the national "prime rate" for banks was the product of an efficient market, driven by free and open competition. *Id.* at 492.

Respondents are nationwide banks whose reported prime rates, along with those of a small number of other nationwide banks, comprise the national "prime rate" index reported on a daily basis in leading financial publications such as the Wall Street Journal and the New York Times. Respondents' "prime plus" credit agreements incorporate by reference the same published "prime rate" indices that represent their own reported "prime rates." These published indices become the "prime" portion of the variable interest charges provided for in respondents' credit agreements. Thus, where the interest rate provided for is "prime +4%," and the

published "prime rate" in a given period is 7%, the total rate charged for that period would be 11%.

Petitioners Hing Q. Lum and Debra Lum, as husband and wife, together with Gary Oriani ("the petitioners") discovered, incident to borrowing funds from respondents, that what respondents reported as their "prime rates" to leading financial publications was, in fact, entirely *unrelated* to the rate charged to their best customers, was based upon arbitrary lending practices, was inflated by as much as 3%, and was *not* the product of free and open competition among banks. Using the example above, assuming respondents' *true* prime rates were 4%, but were reported as 7% in the period in question, the total rate charged to petitioners should have been 8% instead of the 11% actually charged.

When they discovered these facts, petitioners brought a civil action against respondents in the United States District Court for the District of New Jersey in 2000. *Lum et al. v. Bank of America et al.*, C.A. No. 00-223("*Lum I*"). Positing jurisdiction under 28 U.S.C. §1331, petitioners sought to represent a class of individuals who borrowed money from the respondents and paid interest purportedly at a rate tied to the "prime rate." Petitioners alleged that, since at least as early as 1987, by reporting "prime rates" to the financial publications which publish the "prime rate" index that were inflated by as much as 3%, respondents have been able to charge and collect interest rate charges from petitioners, and other "prime rate" borrowers, that were inflated by this same 3% margin. Since respondents utilized the U.S. Mails to charge and collect these excessive interest charges, and their fraudulent scheme has existed over a number of years, petitioners asserted

claims for damages under 18 U.S.C. §1962 (c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), based upon predicate acts of mail and/or wire fraud.

Respondents filed a motion to dismiss petitioners' complaint in *Lum I* pursuant to Fed. R. Civ. P. 12(b)(6), contending that it was well known for years that the term "prime rate" "no longer represents the rate banks charge to their best customers." The centerpiece of this argument consisted of language in the Chase Credit Card Agreement with petitioner Debra Lum, which respondents contended disclosed that the term "prime rate" did *not* represent the "best rate" of any bank. By contrast, petitioners contended that the language in the Chase Credit Card Agreement referred only to the prime rate *index*, not to the *term* "prime rate" itself. Petitioners argued that, although the *index* could not represent the "best rate" of any individual bank at any given time, it had to be a *composite* of the "best rates" of the individual banks whose reported prime rates comprised the index. Otherwise, it could not be accurately described as a "prime rate" index.

As petitioners later discovered, even as they were arguing to the contrary to the courts below, respondents possessed evidence - which they kept concealed from both petitioners and the courts below - in the form of their own official, glossary definitions of the term "prime rate," that would have directly *supported* petitioners' arguments on this crucial issue. This evidence included a document entitled "Chase Credit Cards Glossary," which defined the term "prime rate" for purposes of Chase Credit Card Agreements, *precisely as petitioners contended in their complaint* it was defined, i.e., as the

"rate banks charge to their best customers." Nevertheless, operating without the benefit of discovery, and unaware of the existence of the Chase Credit Cards Glossary, petitioners were powerless to contradict the interpretation of the Chase Credit Card Agreement proffered by respondents to the District Court. As a result, respondents' motion to dismiss was granted. *Lum et al. v. Bank of America et al.*, 2001 U.S. Dist. LEXIS 25178, 2001 WL 34059378(D.N.J. November 29, 2001).

Upon petitioners' appeal, the same Chase Credit Card Agreement became the centerpiece of respondents' opposition to the appeal. Significantly, in *Lum v. Bank of America*, 361 F.3d 217 (3d Cir. 2004), in the very *first sentence* of its decision, the court of appeals stated what was obvious to all the parties: that "the meaning of the term 'prime rate'" was "at the heart" of the controversy. *Id.* at 223. However, because they had not yet discovered the Chase Credit Cards Glossary, petitioners again had no meaningful way to contradict respondents' proffered interpretation of the term "prime rate" as used in the Chase Credit Card Agreement, and the district court's order of dismissal was affirmed. *Id.*

It was not until three months *after* this affirmance that petitioners discovered the "Chase Credit Cards Glossary" on the Chase internet website. Respondent Chase later admitted that this document had been added by Chase to its website *after* the close of briefing on petitioners' appeal in *Lum I*. Even though the "Chase Credit Cards Glossary" defined the term "prime rate," for purposes of Chase Credit Card Agreements, as "the rate banks charge to their best customers," precisely as petitioners contended it was defined, neither respondents nor their attorneys *ever disclosed* the existence of the

Chase Credit Cards Glossary either to petitioners, or to the courts below at any time while *Lum I* was pending. Yet this glossary definition would have enabled petitioners to *refute* respondents' repeated contentions, made in over four years of litigation in *Lum I*, that the term "prime rate" did *not* represent "the rate banks charge to their best customers" either in general, or in particular for purposes of the Chase Credit Card Agreement with petitioner Debra Lum. At the very least, the Chase Credit Cards Glossary would have established that a fact issue was presented for trial about the meaning of the term "prime rate," and respondents' motion to dismiss would have been denied on that basis.

Upon discovering the Chase Credit Cards Glossary, as well as the glossaries of other respondents' on their respective websites, *also* defining the term "prime rate" as "the rate banks charge to their best customers" or in words to that effect, petitioners filed this independent action ("*Lum II*") to set aside the order of dismissal of their federal RICO claims in *Lum I*. As the basis for this relief, petitioners cited in their amended complaint respondents' fraud on the court in *Lum I*, misconduct by respondents and their attorneys in that earlier litigation, and the newly-discovered evidence of the Chase Credit Cards Glossary, and respondents' other glossary definitions buttressing their claims.

Nevertheless, the district court dismissed petitioners' independent action. The court concluded that this newly discovered evidence was merely cumulative, not material to the case, and would not have changed the court's judgment in *Lum I* (App. 11-14). The district court also ruled that there was no fraud on the court, and no circumstances showing a grave miscarriage of justice

in the earlier action (App. 13-14).

The court of appeals affirmed the dismissal of *Lum II*. (App.1-10). It held that, notwithstanding its observation in *Lum I* that the definition of the term "prime rate" was at the "heart" of its disposition of the appeal in that case, whatever misrepresentations may have been made to the Court by respondents or their counsel about the definition of that term there were "not material to the outcome"(App. 7). In other words, the same court of appeals that declared the definition of the term "prime rate" to be at the very "heart" of the appeal before it in *Lum I*, later referred to the misrepresentation of that definition by respondents as "not material to the outcome..." of that appeal (App. 7).

The inconsistency in these two positions taken by the court of appeals in *Lum I* and *Lum II* regarding the materiality of the definition of the term "prime rate"can be logically explained in only one way: by the court of appeals' implicit holding that proof of reliance is an essential element of a federal civil RICO claim based upon predicated acts of mail and/or wire fraud (App. 5). As the court of appeals in *Lum I* ruled, because there was no proof that respondents' undisclosed glossaries were ever "presented" to petitioners (i.e., no proof the petitioners *relied* upon these glossaries), it was able to conclude that the glossaries, as well as respondents' misrepresentations regarding the definition of the term "prime rate," were "not material" to the outcome (App.5-7). Implicit in this ruling was the conclusion that proof of reliance is an essential element of a civil RICO claim based upon predicate acts of mail and/or wire fraud. *Id.*

The court of appeals also ruled that, because the glossary definitions were "not material" to the outcome in

Lum I, respondents did not commit a fraud on the court when they failed to disclose to the district court the existence of their glossary definitions of the term "prime rate," and misrepresented to the court that the term "prime rate" "no longer represented the rate banks charge to their best customers." Nor were there present the kind of extraordinary circumstances which would constitute a "grave miscarriage of justice," and justify the resort to the court's equitable powers in order to accomplish justice (App. 7-8).

On June 7, 2007, the court of appeals denied petitioners' timely filed combined petition for panel rehearing with suggestion for rehearing *en banc* (App. 18-19). Petitioners have now brought to this Court their petition seeking a writ of certiorari to the court of appeals for the Third Circuit.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals' Determination Below Conflicts With The Decisions Of Other Circuit Courts of Appeals Which Hold That Proof Of Reliance Is *Not* Required to Establish a Civil Claim For Damages Under RICO, Based Upon the Predicate Acts of Mail and/or Wire Fraud.

Four circuit courts of appeal have adopted the view that proof of reliance is *not* a necessary element of a civil RICO claim based upon predicate acts of mail and/or wire fraud. See, e.g., *Phoenix Bond & Indem. Co. v. Bridge*, 477 F.3d 928, 932-933 (7th Cir. 2007); *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994); *Systems Management, Inc. v. Loiselle*, 303 F.3d 100, 103-04 (1st Cir. 2002); *Ideal Steel*

Supply Corp. v. Anza, 373 F.3d 251, 263 (2d Cir. 2004), *reversed on other grounds, Anza v. Ideal Steel Supply Corp.*, ___U.S.___;126 S.Ct. 1991(2006). See also *Anza*, ___U.S. at___;126 S.Ct. at 2007(Thomas, J., concurring in part and dissenting in part)("Because an individual can commit an indictable act of mail fraud or wire fraud *even if no one relies on his fraud*, he can engage in a pattern of racketeering activity, in violation of [18 U.S.C.] § 1962, without proof of reliance.")(emphasis added).

With the implicit holding to the contrary by the Third Circuit court of appeals in this case, and in *Lum I*, four circuit courts of appeal have now held that proof of reliance *is* required to make out a civil RICO claim based upon predicate acts of mail and/or wire fraud. See, e.g., *Vandenbroeck v. Common Point Mortgage Co.*, 210 F.3d 696 (6th Cir. 2000) (plaintiffs must show that they "in fact relied upon [the defendant's] material misrepresentation"); *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1360-61 (11th Cir. 2002); *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 219 (5th Cir. 2003) ("RICO fraud cases 'require a showing of detrimental reliance *by the plaintiff*....'") (emphasis in original).

The conflict among the circuits on this issue is even more pronounced than appears at first blush. For example, some circuits appear to hold that proof of reliance is required when the transactions that form the RICO mail fraud claim involve misrepresentations made directly to the fraud victim; but is *not* required when the misrepresentations are made to a third party. See, e.g., *Anza v. Ideal Steel Supply Corp.*, 373 F.3d at 263. This case represents the occasion for resolving this collateral issue as well, because respondents' fraudulent scheme of

artificially inflating the national "prime rate" index does not implicate only misrepresentations they made directly to petitioners themselves, and to other "prime plus" borrowers through respondents misleading use of the term "prime rate" in their credit agreements. It also involves misrepresentations they made to third parties, such as the national financial publications which disseminate the national "prime rate" indexes.

This Court has considered resolving the conflict on the question of whether proof of reliance is required in connection with a civil RICO mail and/or wire fraud claim on at least one prior occasion. See, *Anza v. Ideal Steel Supply Corp.*, ___U.S. at ___;126 S. Ct. at 1996-1997. But on that occasion the Court found it unnecessary to reach this issue, because the plaintiffs in that case could not establish the "proximate cause" requirement articulated by this Court in *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 268(1992). *Id.*

Proximate cause considerations will *not* preclude this Court from reaching the issue of reliance here. Petitioners and the class of "prime plus" borrowers they seek to represent are the primary, if not the *only* targets of respondents' scheme to artificially inflate the national "prime rate" indexes. With the possible exception of sub-prime borrowers indirectly affected by respondents' scheme,[1] petitioners and their putative class of "prime plus" borrowers are the *only* ones who have suffered

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[1]An example of borrowers *indirectly* injured would be sub-prime mortgagees whose mortgage rates varied in relation to the published "prime rate" indices, but whose mortgage loans were with other lenders, and not with respondents.

economic injury as the result of respondents' artificially inflated "prime rates." As parties to "prime plus" credit agreements which incorporate the national "prime rate" index by reference into their formulae for determining interest rate charges, they have suffered economic injury in direct proportion to the amount by which respondents' reported "prime rates" were artificially inflated.

2. Requiring Proof of Reliance to Establish a Civil Claim Under RICO Based Upon the Predicate Acts of Mail and/or Wire Fraud Undermines The Will of Congress, Renders RICO a Toothless Tiger and Deprives the Victims of Mail Fraud Schemes, Including Consumers and Small Businesses, Of the Remedy Which Congress Meant to Provide Them in Order to Recover Their Losses on An Individual or Class-Wide Basis.

This case exemplifies the manner in which the perceived need for proof of "reliance," as an essential element of a civil claim brought under the federal RICO statute, renders RICO's civil enforcement provisions a toothless tiger as a remedy for consumers and small businesses who are victimized by mail and/or wire fraud schemes -- the same victims of fraud whom Congress intended to empower when it enacted the mail fraud and wire fraud statutes, as well as the civil provisions of the RICO statute.

The definition of the term "prime rate" as that "rate [which] banks charge to their best customers" is so well-established that the definition is found in Webster's dictionary, in numerous economic textbooks and, as noted above, *even in the respondents' own website glossaries.* However, respondents have been careful to *avoid* directly

including that definition in their lending agreements based upon the "prime rate." At the same time, they are able to maintain the fiction that borrowers who enter into these agreements are receiving interest rates based upon the "rates [which] banks charge to their best customers," by basing the interest rates charged in these lending agreements on the national "prime rate" index, and by providing for interest rates in those agreements such as "prime +2," "prime +5," etc. What respondents never reveal in their credit agreements is that they control the "prime rate" indexes, and have artificially inflated them by reporting as their "prime rates" interest rates which are artificially inflated substantially *above* the rates they charge to their best customers, i.e., their *true* prime rates, by as much as 3%.

When petitioners uncovered this scheme, and filed their civil RICO claims against respondents in *Lum I*, respondents did not deny that their reported "prime rates" are interest rates artificially inflated *above* the rates they charge to their best customers. Instead, they asserted that it has "been well-known for years" that "the term 'prime rate' no longer represents the rate banks charge to their best customers," but is "essentially meaningless." Petitioners then discovered, and demonstrated in this case (*Lum II*), that respondents' argument in *Lum I* was a misrepresentation because respondents' *own official glossaries* define the term "prime rate" as "the rate banks charge to their best customers." In response to these new arguments by the petitioners, respondents changed their approach. They argued---and the courts below agreed---that petitioners' claims were nevertheless properly dismissed because there was no evidence in *Lum I* to indicate that respondents' glossaries were ever "presented" to

petitioners, i.e., no proof that petitioners *had ever relied* upon respondents' official glossary definitions of the term "prime rate"(App. 5;6-7).

These facts make clear that when proof of reliance is required as an essential element of a civil RICO claim based upon predicate acts of mail and/or wire fraud, sophisticated commercial entities like the respondent banks here remain free to engage in widespread schemes of fraud. Unscrupulous corporations can promote the perception, through their websites and in solicitations sent through the U.S. mails, that they are selling one thing, such as interest rates for lending, while their real intention is to sell something entirely different, such as interest rates *qualitatively different*, with substantially more onerous financial consequences than either implicitly or explicitly represented. As a result, the holding that there must be "proof of reliance" before triggering RICO's civil enforcement machinery turns that machinery into a shield of *protection* for fraudulent schemes, rather than a tool for *deterring* such schemes, as Congress intended.[2]

In fact, in those circuits requiring fraud victims to prove reliance, the RICO statute has no greater power than a claim of common law fraud in its ability to deter massive schemes of mail and/or wire fraud. Where proof of reliance is required, the civil provisions of RICO fail to

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[2] *Cf., Sedima v. Imrex Co.*, 473 U.S. 479, 499 (1985), citing *Haroco, Inc. v American National Bank & Trust Co. Of Chicago*, 747 F.2d 384, 398 (7th Cir. 1984) (emphasizing the "breadth" of Congress's remedial purposes in enacting the RICO statute).

provide an effective mechanism for the victims of fraud to recover for losses arising from widespread fraudulent schemes, and widespread patterns of fraudulent misrepresentation, in all but the narrowest of situations. See, e.g., *Vandenbroeck v. Common Point Mortgage Co.*, 210 F.3d 696 (6th Cir. 2000); (plaintiffs must show that they "in fact relied upon [the defendant's] material misrepresentation"); *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1360-1361 (11th Cir. 2002) (same).

Moreover, when the costs of individual action are prohibitive, as is so often the case for victims of widespread mail and/or wire fraud schemes, and class-wide RICO claims are asserted, the perceived need for proof of "individual reliance" leads inexorably to the conclusion that "individual issues predominate over common issues," thereby requiring the denial of any class certification motion pursuant to Fed. R.Civ. P. 23. See, e.g., *Sikes*, 281 F.3d at1360-66. Thus, even though mail and wire fraud schemes often result in damage to business and/or property on a massive basis, involving thousands of victims, because the damage they cause an individual is frequently too small to warrant a separate, independent action, and the recovery of damages cannot be pursued on a class-wide basis, the civil provisions of RICO are effectively rendered meaningless in those circuits that require proof of reliance.

This Court should therefore reassert the intention of Congress in enacting RICO's civil enforcement machinery, by holding that RICO does *not* require proof of reliance when the predicate acts are mail and/or wire fraud.

3. Respondents' Deliberate Misrepresentations To the Courts Below of Their Understanding of the Term "Prime Rate," In Order To Sanitize Their Conduct of Misleading the Petitioners, Is A Fraud On the Court And a Grave Miscarriage of Justice.

This Court has enunciated a longstanding focus on the "preservation of the integrity of the judicial process." *Hazel-Atlas Glass Co v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944). Yet if only the most "egregious conduct, such as bribery of a judge or members of a jury" will "rise to the level of fraud on the court," as expressed by the court of appeals in this case, there will always remain a strong temptation for unscrupulous litigants to engage in conduct of a "less egregious" nature, such as withholding material information from the court and/or making affirmative misrepresentations to the court on an important issue presented. Litigants will feel they are free to engage in this type of misconduct in federal courts, secure in the knowledge that as long as they avoid bribery, or similar types of "egregious conduct," they will not be held accountable for their blatantly dishonest actions.

Indeed, the court of appeals appears to have strained to reach its finding that the misrepresentations to the court below by respondents were "not material," and therefore could not form the basis for a finding of "fraud on the court." It sought to bolster its "immateriality" finding with the puzzling conclusion that as long as it could not be said that "no reasonable person" could interpret the term "prime rate" other than the manner in which it was interpreted by petitioners, respondents' undisclosed glossaries would not have changed the outcome of defendants' motion to dismiss in

Lum I. In fact, however, this ruling nullifies over fifty years of jurisprudence relating to the federal mail fraud statute, which universally holds that even partial or ambiguous language can form the basis for a federal mail fraud claim.[3] Accordingly, even if the term "prime rate" were an ambiguous term (which it clearly is *not*), respondents' misleading use of that term could still form the basis for RICO claims based upon predicate acts of mail and/or wire fraud. Recognition of this well-settled principle would have required the court of appeals to acknowledge the materiality of respondents' misrepresentations to the court.

In light of these considerations, this Court should review the decision below for the added purpose of protecting the integrity of litigation in our federal courts. The Court should insure that the standards of integrity applied by our federal courts are both uniform and realistic in recognizing that *any* affirmative misrepresentation of material fact *to the Court itself* can undermine the truth-determining function of federal litigation, and can therefore form the basis for a finding of "fraud on the court."

Finally, this Court has ruled that when a litigant's *inadvertent* omission of material facts results in a judgment by a federal court that is different from the judgment which might have been obtained if the undisclosed facts had been known to the court, these

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[3] See, e.g., *United States v. Autuori*, 212 F.3d 105, 119 (2d Cir. 2000) (under the mail fraud statute, a "duty to disclose can also arise in a situation where a defendant makes partial or ambiguous statements that require further disclosure in order to avoid being misleading"); *United States v. Townley*, 665 F.2d 579, 585 (5th Cir. 1982) (same).

circumstances do not constitute the type of "grave miscarriage of justice" that would warrant setting aside the judgment in an independent action filed for that purpose. See *United States v. Beggerly*, 524 U.S. 38, 48-49 (1998). However, the Court has never defined what *does* constitute a "grave miscarriage of justice." Nor has this Court ever considered whether an *affirmative* misrepresentation by litigants, that succeeds in misleading a federal court about a crucial issue, constitutes the type of "grave miscarriage of justice" which would warrant setting aside an order of dismissal obtained with the aid of that misrepresentation. The Court's guidance is needed on this important issue as well.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit and, ultimately, to vacate and reverse that judgment and remand the matter to the United States District Court for the District of New Jersey, with instructions that the petitioners' complaint be reinstated to the court's docket, and that discovery be held in preparation for a full trial of the issues on their merits; or provide the petitioners with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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(any footnotes trail end of each document)

NO. 05-5460

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HING Q. LUM; DEBRA LUM, husband and wife; GARY ORIANI,
Appellants

v.

BANK OF AMERICA; CITIBANK, N.A.; FIRST UNION NATIONAL BANK; WELLS FARGO BANK, N.A.; FLEET BANK; PNC BANK, N.A.; THE BANK OF NEW YORK; KEY BANK; BANK ONE; U.S. BANK; JOHN DOES 1 THROUGH 100; JP MORGAN CHASE BANK, N.A.

March 26, 2007, Submitted Under Third Circuit LAR 34.1(a)

May 7, 2007, Filed

NOTICE: NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For HING Q. LUM, DEBRA LUM, husband and wife, GARY ORIANI, Appellants: G. Martin Meyers, Denville, NJ; Kathleen C. Goger, Singer & Goger, Newark, NJ.

For BANK AMER CORP, Appellee: Anthony J. Laura, Mark S. Melodia, Reed Smith, Princeton, NJ.

For CITIBANK NA, Appellee: Joseph L. Buckley, Richard H. Epstein, Sills, Cummis, Epstein & Gross, Newark, NJ.

For FIRST UNION NATIONAL BANK, Appellee: Gregory R. Haworth, Duane Morris, Newark, NJ.

For WELLS FARGO BANK NA, Appellee: Brian J. McMahon, Gibbons, Newark, NJ.

For PNC BANK, Appellee: Darryl J. May, Ballard, Spahr, Andrews & Ingersoll, Philadelphia, PA; Dean C. Waldt, Ballard, Spahr, Andrews & Ingersoll, Voorhees, NJ.

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For KEY BANK, Appellee: Warren H. Colodner, Kirkpatrick & Lockhart Preston, Gates Ellis, New York, NY.

For US BANK, Appellee: Frederick A. Nicoll, Dorsey & Whitney, Paramus, NJ.

For JP MORGAN CHASE BANK, Appellee: Peter E. Greene, Skadden, Arps, Slate, Meagher & Flom, New York, NY.

JUDGES: RENDELL, JORDAN, ROTH, Circuit Judges.

OPINION BY: RENDELL

OPINION

OPINION OF THE COURT

RENDELL. Circuit Judge.

Plaintiffs Hing Quan Lum, Debra Lum, and Gary Oriani appeal from the order by the United States District Court for the District of New Jersey granting defendants'[1] motion to dismiss Plaintiffs' amended complaint. The complaint sought to set aside an order in a prior suit between the parties in which the court had granted the Defendants' motion to dismiss the original action. *See Lum v. Bank of Am.*, No. 00-223, 2001 U.S. Dist. LEXIS 25178, 2001 WL 34059378 (D.N.J. Nov. 29, 2001), *aff'd* 361 F.3d 217 (3d Cir. 2004). Plaintiffs' claim was based on four grounds: newly discovered evidence; misconduct of the Defendants directed at the Plaintiffs; fraud on the court; and a prayer for relief based on the court's equitable powers. The District Court granted the Defendants'motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons set forth below we will affirm the District Court's order.[2]

I.

Plaintiffs filed the original complaint in 2000, claiming to represent a class of individuals who borrowed money from the Defendants and paid an interest rate (pursuant to a loan agreement, financial or credit instrument, or credit card agreement) tied to the "prime rate." The Plaintiffs alleged that "prime rate" meant the "rate offered to the bank's most credit-worthy customers." *Lum*, 2001 U.S. Dist. LEXIS 25178, 2001 WL 34059378, at *1. According to Plaintiffs, the Defendants artificially inflated the rate Plaintiffs paid by reporting a "prime rate" to Defendants' customers and national newspapers that did not reflect the rate charged to their best customers. Plaintiffs alleged that Defendants' conduct in reporting the allegedly inflated rate violated the Sherman Antitrust Act, 15 U.S.C. § 1, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c); that the Defendants conspired to violate RICO, 18 U.S.C. § 1962(d); that they violated the New Jersey Consumer Fraud Statute, N.J. STAT. ANN. 56:8-2 et seq; and that they breached their contract with Plaintiffs.

The District Court granted Defendants' motion to dismiss Plaintiffs' complaint. The District Court dismissed the antitrust claim because Plaintiffs failed to plead the facts that constituted the conspiracy, the conspiracy's object, or its accomplishment. *Lum*, 2001 U.S. Dist. LEXIS 25178, 2001 WL 34059378, at *2-*3. The Court dismissed the Plaintiffs' RICO claim because it did not meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b) that applies where, as here, the predicate acts of the RICO claim

are mail and wire fraud. 2001 U.S. Dist. LEXIS 25178, [WL] at *4. In addition, the District Court dismissed the RICO conspiracy claim noting that a claim that alleges conspiracy to violate RICO fails if the allegations do not state a substantive RICO violation. 2001 U.S. Dist. LEXIS 25178, [WL] at *5 (citing *Lightning Lube Inc. v. Witco Corp.*, 4 F.3d 1153, 1191 (3d Cir. 1993)).[3] We affirmed.[4]

In affirming the District Court, we noted that the term "prime rate" was "sufficiently indefinite that it is reasonable for parties to have different understandings," *id.* at 226, and the financial agreements entered into evidence did not define the term "prime rate" as the rate available to the banks' best customers. Rather, the agreements defined "prime rate" as the rate "reported in the New York Times," "published in the 'Money Rates' table of The Wall Street Journal," and "the base rate on corporate loans at large U.S. money center commercial banks." *Id.* at 222. Plaintiffs also submitted in their original action evidence of glossary definitions from Citibank NA ("Citibank") and First Union National Bank ("First Union") in which the term "prime rate" was defined as the interest rate banks charge their most credit-worthy customers. *Id.* at 225. But we noted that the Plaintiffs did not indicate that these glossary definitions were presented to the named Plaintiffs or that anyone entered into a financial transaction with First Union or Citibank which used the term "prime rate." *Id.* at 225-26.[5]

Plaintiffs filed this action on May 24, 2005 seeking to set aside the District Court's order, and on June 16, 2005 they filed an amended complaint. Plaintiffs argued that

the order by the District Court in the original action should be set aside because glossary definitions on five of the Defendants' websites that have been uncovered undermine the order. This, they contended, was newly discovered evidence entitling them to relief from the order, as well as evidence of fraud on the court. Defendants filed a motion to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In an independent action such as this-as opposed to a Rule 60(b) motion[6] -we must find a "grave miscarriage of justice" in order to set aside a prior judgment. *See United States v. Beggerly*, 524 U.S. 38, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998) (finding no grave miscarriage of justice where the government failed to thoroughly search their records). The District Court found that the alleged transgressions did not rise to that level and granted Defendants' motion to dismiss. The District Court found that the new evidence was cumulative, not material to the case, and would not have changed the outcome of the case; and that the plaintiffs' alleged facts, even accepted as true, were not sufficient to prove fraud on the court.

II.

On appeal, Plaintiffs reiterate their contention that a grave miscarriage of justice would result if the 2001 order stands. We agree that Plaintiffs have failed to establish that a grave miscarriage of justice occurred.

The original complaint was dismissed by the District Court, and upheld by our Court, due to a failure to plead with particularity. These newly discovered definitions do not cure that failure because they do not allege a specific date, place, or time for the fraud or an

alternate means to inject precision into the allegations. And as alternate definitions of prime rate exist, Plaintiffs have still failed to show-even with the new glossary definitions-that the definition of prime rate as the rate available to a banks' best customers was so well-known that a reasonable person could not understand the term to be otherwise.[7] Based on the same facts, Plaintiffs claim that the Defendants committed misconduct directed at the Plaintiffs when they failed to disclose the existence of the glossary definitions pursuant to Federal Rule of Civil Procedure 26, and that these acts constituted a fraud on the court. As discussed above, the glossary definitions were not material to the outcome and, in addition, a fraud on the court action faces a demanding standard of proof. Finding fraud on the court "'must be supported by clear, unequivocal and convincing evidence,'" *Herring v. United States*, 424 F.3d 384, 387 (3d Cir. 2005) (quoting *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 538 F.2d 180, 195 (8th Cir. 1976)), and is justified by only the "most egregious misconduct directed to the court itself," *id.*, such as bribery of a juror or fabrication of evidence. *Zurich N. Am. v. Matrix Serv. Inc.*, 426 F.3d 1281, 1291 (10th Cir. 2005); *Greiner v. City of Champlin*, 152 F.3d 787, 789 (8th Cir. 1998). We have nothing of that sort here. Lastly, Plaintiffs also contend that the judgment should be set aside pursuant to the equitable powers of the court. A court can vacate a judgment pursuant to its equitable powers where extraordinary circumstances are present and "whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 615, 69 S. Ct. 384, 93 L. Ed. 266 (1949). As we have described above, this case does not present grave or

"extraordinary circumstances" which require the use of equitable powers to accomplish justice.

CONCLUSION

For the reasons stated above and for the reasons given by the District Court we will AFFIRM the District Court's grant of the Defendants' motion to dismiss the Plaintiffs' amended complaint

Footnotes

[1]The Defendant Banks include Bank of America Corp, Citibank NA, Chase Manhattan Bank, Morgan Guaranty Trust Co. of New York, First Union National Bank, Wells Fargo Bank NA, Fleet Bank, PNC Bank, Bank NY, Key Bank, Bank One Corp., US Bank, and JP Morgan Chase Bank ("Defendant Banks").

[2]The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1332. We exercise jurisdiction pursuant to 28 U.S.C. § 1291. We review a district court's grant of a motion to dismiss an amended complaint *de novo*. *Herring v. United States*, 424 F.3d 384, 389 (3d Cir. 2005). In a motion to dismiss, we must accept as true all factual allegations in the complaint and draw all reasonable inferences from the facts in Plaintiffs' favor. *Moore v. Tartler*, 986 F.2d 682, 685 (3d Cir. 1993). However, we "need not credit a complaint's 'bald assertions' or 'legal conclusions.'" *Cal. Pub. Employees' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 143 (3d Cir. 2004) (quoting *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997)).

[3]Because the District Court dismissed all of the Plaintiffs' federal causes of action, it declined to exercise supplemental jurisdiction over the Plaintiffs' state-law claims. 2001 U.S. Dist. LEXIS 25178, [WL] at *6.

[4]*Lum v. Bank of Am.*, 361 F.3d 217, 226 (3d Cir. 2004). We affirmed the order finding that the Plaintiff failed to plead with the necessary particularity required for fraud under Rule 9(b). Id. at 220. We noted that Rule 9(b) not only applied to the RICO claims, but also to the antitrust claim which was based on fraud. *Id.* Plaintiffs had failed to plead with particularity as required by Rule 9(b) because Plaintiffs failed to allege what specific conduct was fraudulent or the date, place, and time of the alleged fraud. *Id.* at 224.

[5]*See Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 659 (3d Cir. 1998) (holding that prior to class certification, the adequacy of the pleading in a RICO action must be based on the specificity of the fraud allegation relating to the named plaintiffs).

[6]Rule 60(b) of the Federal Rules of Civil Procedure provides that "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud[,] . . . misrepresentation, or other misconduct of an adverse party. . . or (6) any other reason justifying relief from the operation of the judgment" Fed. R. Civ. P. 60(b). Motions under Rule 60(b)(1)-(3) must be made "not more than one year after the judgement, order, or

proceeding was entered or taken." *Id.* In addition, the Rule provides that the "power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding" is not limited by the rule. *Id.*

[7] *See Lum*, 361 F.3d at 226 (noting "prime rate" is an indefinite term and referencing a congressional committee staff report and other court opinions discussing the term's lack of precision).

CIVIL ACTION NO: 05-2640 (FSH)

UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

HING Q. LUM; DEBRA LUM, husband and wife; GARY ORIANI,
Plaintiffs

v.

BANK OF AMERICA; CITIBANK, N.A.; FIRST UNION NATIONAL BANK; WELLS FARGO BANK, N.A.; FLEET BANK; PNC BANK, N.A.; THE BANK OF NEW YORK; KEY BANK; BANK ONE; U.S. BANK; JOHN DOES 1 THROUGH 100; JP MORGAN CHASE BANK, N.A.
Defendants

Date: December 8, 2005

ORDER

HOCHBERG, District Judge

Presently before the Court is a motion to dismiss the amended complaint[1], pursuant to Fed. R. Civ. P. 12(b)(6), filed jointly by defendants Bank of America ("Bank of America"), Citibank, N.A. ("Citibank"), JP Morgan Chase Bank ("JP Morgan"), First Union National Bank ("First Union"), Wells Fargo Bank, N.A. ("Wells Fargo"), PNC Bank, N.A. ("PNC"), The Bank of New York ("Bank of New York"), Key Bank, and U.S. Bank (collectively, "Defendant Banks"). In this case, Plaintiffs seek to set aside this Court's November

21, 2001 judgment dismissing Plaintiffs' prior suit, which was subsequently affirmed by the United States Court of Appeals for the Third Circuit on appeal (prior action hereinafter referred to as "Lum I").[2]

The relevant facts surrounding Lum I are as follows: Plaintiffs borrowed money from defendant banks pursuant to lending agreements with "prime plus" interest rates. Plaintiffs claimed that defendant banks, in setting "prime plus" interest rates, violated the Sherman Antitrust Act, 15 U.S.C. § 1, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(c), 1962(d). Plaintiffs maintained that Defendant Banks allegedly violated the Sherman Act by agreeing to misrepresent that "prime rate" was the lowest rate available to their most creditworthy borrowers, when in fact they offered some large borrowers financing at interest rates below prime rate; they allegedly gave false information about their "prime rate" both to consumers who were seeking credit and to leading financial publications, such as the *New York Times* and the *Wall Street Journal*, which publish independent indices of the prime rate. Plaintiffs argued that Defendants allegedly violated RICO by making these misrepresentations about "prime rate" through the mails and over interstate wires. Plaintiffs claimed that the fraudulently inflated "prime rate" has resulted in their being charged higher interest than permitted by the terms of the "prime plus" loan agreements.

In Lum I, this Court dismissed Plaintiffs' RICO claim because it lacked the specificity in pleading fraud that is required under Fed. R, Civ. P. 9(b), and dismissed the antitrust claim for failure to meet the minimum

standards for pleading an antitrust conspiracy. The Third Circuit affirmed this Court's holding that the RICO claim was properly dismissed because the claim, which was predicated on mail and wire fraud, had not been pled with specificity as required by Fed. R. Civ. P. 9(b). In addition, the antitrust claim which was also based on fraud,[3] did not comply with Rule 9(b), and therefore was properly dismissed on this ground.[4]

In the action now before this Court, Plaintiffs' amended complaint seeks to set aside this Court's decision in Lum I on the grounds that newly-discovered evidence entitles them to relief from judgment and consequently, defendant banks allegedly committed a fraud on the Court, a fraud on Plaintiffs, and other misconduct. Defendant Banks have moved to dismiss Plaintiffs' amended complaint pursuant to Fed. R. Civ. P. 12(b)(6). It appearing that a Motion to Dismiss is governed by Fed. R. Civ. P. 12(b)(6); and

it appearing that Fed. R. Civ. P. 12(b)(6) provides that in order to grant a 12(b)(6) motion to dismiss, the court must find that Plaintiffs will be unable to prevail even if they prove all the allegations in the complaint,[5] and

it appearing that Plaintiffs' claims are predicated on a recent discovery on the Internet of the definition of the term "prime rate" in glossaries found on the web sites of Defendants Chase, Wells Fargo, U.S. Bank and Bank of America; and

it appearing that the finality of a judgment is the very principle upon which our judicial system is based, and an independent action seeking relief from such final judgment is thus available only to prevent a grave

miscarriage of justice, [6] and

it appearing that newly-discovered evidence only entitles a party relief from judgment if such evidence is (1) material and not merely cumulative, (2) could not have been discovered prior to trial through the exercise of reasonable diligence, and (3) would probably have changed the outcome of the trial. Bohus v. Beloff, 950 F.2d 919, 930 (3d Cir.1991); and it appearing that Plaintiffs' alleged newly-discovered evidence is merely cumulative and not material to the case, and would not have changed this Court's judgment in Lum I;[7] and

it appearing that Plaintiffs' claim for fraud on the court can only be satisfied by a showing of; (1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) in fact deceives the court. Herring v. United States, 424 F.3 d 384, 387 (3d Cir. 2005); and

it appearing that a determination of fraud on the court may be justified only by the most egregious misconduct directed to the court itself,[8] and that it must be supported by clear, unequivocal and convincing evidence; and

it appearing that Plaintiffs' alleged facts, even if accepted as true, fail to aver a factual basis for relief under the legal standard for fraud upon the court; and

and this Court having considered the instant motion and parties' submissions pursuant to Fed. R. Civ. P. 78, and for good cause having been shown,

IT IS on this 8th day of December, 2005,

ORDERED that Defendant Banks' Motion to Dismiss is hereby GRANTED; and it is further

ORDERED that Plaintiffs' claims pursuant to the newly-discovered evidence are dismissed with prejudice; and it is further

ORDERED that this case is CLOSED.

Hon. Faith S. Hochberg

HON. FAITH S. HOCHBERG, U.S.D.J.

Footnotes

[1] Plaintiffs filed the complaint in this action on May 24, 2005, and subsequently filed the amended complaint on June 16, 2005.

[2] Lum v. Bank of America, 361 F.3d 217 (3d Cir.), cert denied, 125 S.Ct. 371(2004),

[3]Plaintiffs claimed that the information given to consumers and independent financial publications contained misrepresentations.

[4]Although antitrust claims generally are not subject to the heightened pleading requirement of Rule 9(b), fraud must be pled with particularity in all claims based on fraud, which was plaintiffs' basis for the alleged antitrust violation.

[5] Motions to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a cause of action result in a determination on the merits at an early stage of a

plaintiff's case. See Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir.1977). As a result, "plaintiff is afforded the safeguard of having all its allegations taken as true and all inferences favorable to plaintiff will be drawn." Id. The court's decision must be based solely on the legal sufficiency of the complaint. See id.

[6]See United States v. Beggerly, 524 U.S. 38, 45-49 (1998) (an independent action seeking to reopen a judgment, based on allegations of adverse party's failure to "thoroughly search its records and make full disclosure to the Court," were insufficient to provide bases for relief).

[7]This Court dismissed the Lum I complaint with prejudice on the ground that Plaintiffs had not plead fraud with particularity required by Fed. R. Civ. P. 9(b) and that, given the unambiguous definition of "prime rate" as used in their credit agreements, could not do so at all. Plaintiffs' alleged newly-discovered evidence contains generic definitions of the term "prime rate" which are nearly identical to those cited by Plaintiffs in Lum I from Citibank. Accordingly, they are merely cumulative of what already existed in the record and do not establish a sufficient basis for a RICO claim even if they were to be admitted into evidence.

[8]"[T]he fraud on the court must constitute "egregious misconduct ... such as bribery of a judge or jury or fabrication of evidence by counsel." Herring,, 424 F.3d at 390. Perjury by a witness is not enough to constitute fraud upon the court. "Were mere perjury sufficient to override the considerable value of finality after the statutory time period for motions on account of fraud

has expired, it would upend [Rule 60's] careful balance." Herring, 424 F.3d at 386-392 citing, Geo. P. Reintjes Co. v. Rileyu Stoker Corp., 71 F.3d 44, 49 (1st Cir.1995).

06/07/2007

NO. 05-5460

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HING Q. LUM; DEBRA LUM, husband and wife; GARY ORIANI,
Appellants

v.

BANK OF AMERICA; CITIBANK, N.A.; FIRST UNION NATIONAL BANK; WELLS FARGO BANK, N.A.; FLEET BANK; PNC BANK, N.A.; THE BANK OF NEW YORK; KEY BANK; BANK ONE; U.S. BANK; JOHN DOES 1 THROUGH 100; JP MORGAN CHASE BANK, N.A.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY
CIVIL ACTION NO: 05-2640 (FSH)
HOCHBERG, District Judge

PRESENT: SCIRICA, CHIEF JUDGE, SLOVITER, MCKEE, RENDELL, AMBRO, SMITH, FISHER, CHAGARES, ORDAN, AND ROTH,* CIRCUIT JUDGES

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellants having been submitted to all judges who participated in the

decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges, of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT